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No. 76-1261

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

vs.

HILDA ABRAMS, ET AL., RESPONDENTS

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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This Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is filed on behalf of Hilda Abrams and the class she represents.

OPINIONS BELOW

The opinion of the Court of Appeals is now reported at 547 F.2d 1062 (9th Cir. 1976).

STATEMENT

Meyler Park Apartments is a 100 unit Section 236[1] federally subsidized project designed to house Respondents who are all elderly lower-income tenants. Between November 1974 and September 1975 rents approved by Petitioners, Secretary of the United States Department of Housing and Urban Development (HUD) and other HUD officials, for Meyler Park Apartments increased 21.2% [R. 448-449] causing Respondents to pay upwards to 46% [R. 106] of their fixed incomes for rent. These rent increases were attributed in part to increases in property taxes and utility costs. [Pl. Ex. H, J and R; R. 44, 47 and 152].

Congress in August 1974 enacted the Section 236 operating subsidy provision.[2] Operating subsidies are designed to benefit both tenants and owners of Section 236 housing projects by making money available to offset escalating costs of property taxes and utilities so that projects can remain viable while rents remain at affordable levels. Both Respondents and the owners and managers of Meyler Park Apartments applied for the benefits of the operating subsidy program. [Pl. Ex. O and R; R. 64-65 and 152]. Petitioners failed to reply to either of these requests. Thus, Respondents filed a complaint seeking to enjoin the rent increase imposed by the owners and managers of Meyler Park Apartments and to mandate Petitioners to make available the operating subsidy payments retroactive to February 18, 1975. [R. 1]. The District Court entered a summary judgment in favor of Respondents.

On July 1, 1976, while appealing the lower court decision, Petitioners made available Section 8[3] benefits to Respond-

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1. Section 236 of the National Housing Act, as enacted in 1968, is "[f]or the purpose of reducing rentals for lower income families." 12 U.S.C. § 1715z-1(a).

2. 12 U.S.C. (Supp. V) § 1715z-1(f)(3) and (g).

3. 42 U.S.C. (Supp. V) § 1437f.

ents and the owners and managers of Meyler Park Apartments which reduced Respondents' rents to 25% of their family income. Because tenants who pay no more than 25% of their income for rent are ineligible to receive the benefits of the operating subsidy program, Petitioners argued to the Ninth Circuit that Respondents' claims were prospectively moot. The Ninth Circuit considered the Respondents' retroactive claim for payments from February 18, 1975 to July 1, 1976 a live and important issue and hence affirmed "the District Court's Order in its every aspect."[4]

Petitioners in the Statement of the case seriously misstate the facts when they assert that release of the money in the reserve fund for payment of operating subsidies requires the use of contract authority.[5] [*Abrams* Pet. 3-5]. This assertion is in reality merely a legal argument which has been rejected by the Ninth Circuit[6] and every court that has considered the issue.[7] The courts have found and

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4. *Abrams v. Hills*, 547 F.2d 1062, 1067, 1071 (9th Cir. 1976).

5. Contract authority is the power conferred upon the government by statute to enter into contracts up to a stated amount with the obligation to pay money immediately and in the future. Appropriations Acts provide for the liquidation of such commitments as they become due. *Abrams v. Hills*, 547 F.2d at 1065. *See also, Train v. City of New York*, 420 U.S. 35, 39 n.2 (1975).

6. *Abrams v. Hills*, 547 F.2d at 1069.

7. *Abrams v. Hills*, 415 F. Supp. 550 (C.D.Ca. 1976); *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Campbell v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. C 75-471 (N.D. Ohio, December 2, 1975); *Carberry v. Hills*, C.A. No. 76-521-F (D.Mass., March 8, 1976); *Dubose v. Hills*, 405 F. Supp. 1277 (D.Conn. 1976); *Folsom Gardens Action Committee v. Hills*, C.A. No. S-76-43 TJM (E.D.Ca., February , 1976); *Gertsch v. Hills*, 414 F. Supp. 15 (D.Utah 1976); *Harrison v. Hills*, C.A. No. 75-938 (W.D.Pa., October 1, 1975); *Lefort v. Hills*, C.A. No. 76-0286 (D. RI, November 19, 1976); *Parker Square Tenants Ass'n v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. 75 CV 577-W-3 (January 27, 1976); *Ross v. Community Services, Inc.*, 405 F. Supp. 831 (D.Md. 1975), *aff'd*, 544 F.2d 514 (4th Cir. 1976); *Sicuro v. Hills*, 415 F. Supp. 553 (C.D.Ca. 1976); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976).

the statute is clear that the reserve fund which is the primary source of cash available to make operating subsidy payments is composed of money collected independently of congressional appropriations. Thus, Petitioners' description of the usual process whereby the Secretary of HUD expends funds through the release and use of contract authority is simply irrelevant to how the reserve fund can be expended.

Petitioners admit that there is at least $54.4 million in the reserve fund and that prior to August 1976 this fund could be used only for the payment of operating subsidies. [*Abrams* Pet. 3 n.2]. Thus, by admission of Petitioners, there is a clear congressional directive and sufficient money[8] to make operating subsidy payments to Respondents for the period of time at issue, February 18, 1975 to July 1, 1976.

REASONS FOR DENYING THE PETITION

There is no split among the Circuit Courts. Both the Fourth Circuit and the Ninth Circuit ruled in favor of Respondents' position. The court below correctly decided the issues involved in this case.

A. There Is No Conflict Between the Circuits or Among the District Courts

Petitioners noted that "the question presented here has arisen in at least 30 cases,[9] has been litigated in two courts of appeals and is presently before two other courts of

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8. Respondents and Petitioners can not agree upon the precise amount of money that Respondents should be paid. However, figures filed by Respondents in the District Court, upon remand, submit that the maximum subsidy per tenants is under $14.00 per unit per month. Petitioners' figures are substantially lower.

9. Petitioners in response to the request of the Ninth Circuit submitted a list of pending operating subsidy suits. There were 40 cases listed as of October 7, 1976.

appeals." [*Ross* Pet. 6-7]. Significantly, however, Petitioners failed to mention that every court that has rendered a decision on the merits of Petitioners' claims has rejected their position and has ruled in favor of the tenants, finding the statute mandatory and ordering payment of operating subsidies. Both the Fourth Circuit[10] and the Ninth Circuit[11] have without dissent affirmed the lower court decisions. Thirteen district courts have also independently reviewed the issues and found that the operating subsidy program must be implemented.[12]

The decisions of all these courts were well reasoned and fully supported by a plain reading of the statute, legislative intent[13] and case law. Ample opportunity was provided to each court to reevaluate its position through motions for rehearings, summary judgments and requests for dissolution of preliminary injunctions filed by the Petitioners.[14] On the merits, none of these courts has reversed its initial findings.

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10. *Ross v. Community Services, Inc.*, 544 F.2d 514.

11. *Abrams v. Hills*, 547 F.2d 1062.

12. *See*, footnote 7, *supra*.

13. S.Rep. No. 693, 93d Cong., 2d Sess. 32 (1974), *reprinted in* (1974) U.S. Code Cong. & Ad. News 4303-4; H.R.Rep. No. 1114, 93d Cong., 2d Sess. 21 (1974); H.R.Conf.Rep. No. 1279, 93d Cong., 2d Sess. (1974), *reprinted in* (1974) U.S. Code Cong. & Ad. News 4475; S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974); S.Rep. No. 326, 94th Cong., 1st Sess. (1975); S.Rep. No. 749, 94th Cong., 2d Sess. 10 (1976), *reprinted in* (1976) U.S. Code Cong. & Ad. News 1894.

14. *Abrams v. Hills*, 415 F. Supp. at 552; *Dubose v. Hills*, 420 F. Supp. 399 (D.Conn. 1976), Ruling on Motion to Vacate Order and Dissolve Preliminary Injunction; *Gertsch v. Hill* [sic], No. C75-513 (D.Ut., March 3, 1977) Order Denying Defendants Motion to Dismiss or, In the Alternative, To Stay Further Proceedings and To Vacate Order and To Dissolve Injunction; *Ross v. Community Services, Inc.*, No. H-75-506 (D.Md., December 31, 1975) order granting plaintiffs motion for summary judgment and denying defendants cross-motion, *Ross* Pet. App. D, 30a; Order denying federal defendants motion to reconsider and motion for a stay (1976).

B. The Issues Were Correctly Decided Below

Ordinarily Respondents would not argue the merits of the case in a Brief in Opposition to a Writ of Certiorari. However, Petitioners in support of their petition for *certiorari* have placed substantial reliance upon the arguments that: the Secretary has absolute discretion not to implement the operating subsidy program and that she has not abused that discretion. Both of these arguments on the merits have been rejected by the courts below.[15]

The Secretary's argument that the operating subsidy provision is permissive is based exclusively on *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C.Cir. 1974). The Secretary's reliance, however, is misplaced. The *Lynn* court held that:

> the Secretary has the discretion, . . . indeed the obligation to suspend [a] programs' operation when he has adequate reason to believe that [the programs] are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs.
> 501 F.2d at 855-856.

The case is inapplicable to the present situation where in contrast, the Secretary is claiming discretion not to implement the operating subsidy program because of her preference for other programs and the alleged administrative inefficiency of the operating subsidy program. In fact, the *Lynn* court itself distinguished the two situations noting that:

> it may be doubted whether mere "concern about the equity and efficiency" of a program duly established by Congress could, without more, support an executive decision to suspend its operation, ...
> 501 F.2d at 852.

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15. *See*, footnotes 6 and 7.

The Ninth Circuit concurred in this reasoning by finding *Lynn* inapposite.[16]

In support of her position that she did not abuse her discretion, the Secretary argues that there is insufficient contract authority available to cover her obligations under the Section 236 interest reduction subsidy, the deep subsidy and operating subsidy programs and that she therefore had the discretion to choose among programs. Assuming *arguendo* that there were not sufficient funds for all three programs, and that the Secretary could choose to implement one program over the others, the Secretary's argument fails because contract authority is not required to release the reserve funds. As noted previously in Respondents' Statement, all the courts have held that the availability of contract authority is immaterial to the release of money from the reserve fund. *See*, pp. 3-4, *supra*. The passage of Pub.L. 94-378, 90 Stat. 1095, does not alter this conclusion.[17] The fact that the new law permits the Secretary to use the reserve fund to liquidate contracts does not implicitly require the use of contract authority to make operating subsidy payments. The reserve fund is still independent of appropriations and immediately available to make operating subsidy payments.

By finding that contract authority is not necessary to the release of the reserve fund, the courts have destroyed Petitioners' stance that implementation of operating subsidies would conflict with other housing programs. The full amount of the contract authority remains available to im-

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16. *Abrams v. Hills*, 547 F.2d at 1068.

17. *See, Abrams v. Hills*, 547 F.2d at 1071 citing *Dubose v. Hills*, 420 F. Supp. at 401-402 which rejected the Secretary's argument on Pub.L. 94-378. *See also, Ross v. Community Services*, 544 F.2d at 514 affirming after the passage of Pub.L. 94-378 the lower court decision which mandated operating subsidies.

plement the interest reduction and deep subsidy programs while the reserve funds are automatically released to make operating subsidy payments. Both obligations can be met without jeopardizing any programs.

Excessive administrative costs are cited for the first time in this appeal to justify the Secretary's assertion that she did not abuse her discretion by deciding not to implement the operating subsidy program.[18] This claim must be rejected because the burden claimed by Petitioners is not substantially different than the burden that they are required to meet in administering similar housing programs.[19]

The final argument posited by Petitioners to support their conclusion that the Secretary did not abuse her discretion in refusing to implement the operating subsidy program is that the reserve fund is insufficient to meet the projected needs. This argument is both factually and legally unsupportable. Within the facts of this case, the

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18. Petitioners self-serving affidavits should be given no weight since it is the first time such affidavits have been presented for consideration. *See, Abrams* Pet. 4 n.3. To do so would deprive Respondents of their due process rights to test the assertions in the affidavits.

19. *See e.g.,* rent supplement program 12 U.S.C. § 1701s: tenants pay twenty-five percent of adjusted income for rent. 12 U.S.C. § 1701s(d). The Secretary must at least biennially certify that the tenants are "qualified" to receive the benefits. 12 U.S.C. § 1701s (e)(1). Section 8 program 42 U.S.C. § 1437f: tenants pay fifteen to twenty-five percent of adjusted income for rent. 42 U.S.C. § 1437f(c)(3). The maximum or fair market rent for an area is established by the Secretary at least annually, 42 U.S.C. § 1437 (c)(1), and rent adjustment may be made on an area or individual basis. 42 U.S.C. § 1437(c)(2). Deep subsidy program 12 U.S.C. § 1715z-1(f)(2); twenty percent of the tenants in a new Section 236 project pay twenty-five percent of their adjusted income for rent including utilities. Changes in the percentage of tenants to be housed in a particular project and the rent-income ratio may be made by the Secretary.

reserve fund which is currently estimated by Petitioners to contain $54.4 million is certainly adequate to pay to each Respondent approximately $14.00 per month for the limited period of February 18, 1975 to July 1, 1976.[20] Courts that have considered the broader impact of the case have also found the fund adequate.[21] Even Petitioners admit that there is more than enough money in the reserve fund to implement the program for one year.[22] Other courts have found that even assuming *arguendo* that the fund is inadequate, it is the Secretary's duty—the function of the administrative branch—to "create reasonable classifications and eligibility requirements in order to allocate the limited funds available to [her] for this purpose."[23]

CONCLUSION

For the foregoing reasons, we submit that the decisions of the Ninth Circuit and the District Court were well reasoned and supported by case law and by concurrent as well as subsequent legislative history. There is no conflict among the lower court decisions. Thus, we respectfully

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20. *Abrams v. Hills*, 547 F.2d at 1069 n. 14, which found that "[t]he amount in the reserve fund is not here material, inasmuch as there certainly remains a sufficient sum to grant the relief requested by the plaintiffs."

21. *Parker Square Tenants Ass'n v. U.S. Dept. of Housing and Urban Dev.*, C.A. No. 75 CV 577-W-3, Slip Op. 18. *See also, Underwood v. Hills*, 414 F. Supp. at 532 in which the D.C. District Court ordered operating subsidy payments to be made for a nationwide class "as the availability of funds permits."

22. *See, Abrams* Pet. 4 where Respondents allege that the implementation of the operating subsidy program would cost $53.7 million for fiscal year 1976 and that as of December 31, 1976 the reserve fund contained approximately $54.4 million.

23. *Ross v. Community Services, Inc.*, 405 F. Supp. at 836 *quoting Morton v. Ruiz*, 415 U.S. 199, 230 (1974).

submit the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 1977.
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